

Administrative Claim No. 14019
Amount: \$25,277.10

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

In re:)	
)	Case No. 08-35653-KRH
CIRCUIT CITY STORES, INC., <i>et al.</i>,)	
)	Chapter 11
Debtors.)	

**GIANT EAGLE, INC.'S RESPONSE TO OBJECTION TO
ADMINISTRATIVE EXPENSE CLAIM NO. 14019**

Giant Eagle, Inc., by its undersigned counsel, makes this Response to the Liquidating Trustee's Fourth Omnibus Objection concerning Giant Eagle's Claim No. 14019 for an administrative expense for stub rent and related charges and obligations. In support thereof, Giant Eagle states as follows:

1. This claim arises out of a lease of real property in Altoona, Pennsylvania, where Debtor operated its Store No. 1683.
2. History of the Lease: The landlord of said property is Sierra North Associates Limited Partnership. Sierra North leased the underlying property to Giant Eagle via a Ground Lease Agreement dated August 12, 1996. A true and correct copy of the Ground Lease is attached as Exhibit A to Giant Eagle's Administrative Expense Request received by Kurtzman

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Counsel for Giant Eagle, Inc.

Carson Associates on May 21, 2009, which is incorporated here by reference. A copy will be provided upon request.

3. Debtor Circuit City Stores, Inc. assumed the Ground Lease via an Assignment and Assumption of Lease, Landlord's Consent and Use Restriction Agreement ("Assumption Agreement") dated December 8, 1998. A true and correct copy of the Assumption Agreement is attached as Exhibit B to Giant Eagle's Administrative Expense Request and is incorporated here by reference. A copy will be provided upon request.

4. Pursuant to the Assumption Agreement, Debtor assumed all of Giant Eagle's duties and obligations under the Ground Lease, including the duties to pay rent, utilities, common area maintenance and real estate taxes. In the event that Debtor defaulted in any of these payments, Giant Eagle was obligated to pay them and Debtor agreed to indemnify Giant Eagle for those payments (Assumption Agreement, ¶¶ 2, 6, 15).

5. Debtor filed for relief under Chapter 11 of the Bankruptcy Code on November 10, 2008. The Debtor had not paid any rent or charges for the month of November.

6. On December 22, 2008, the Bankruptcy Court determined that all rent and lease obligations accruing on a pro-rata basis on and after November 11, 2008 through November 30, 2008 were administrative expenses under 11 U.S.C. § 503(b) and 507(a)(2). The Debtor's appeal of this decision was dismissed upon the Debtor's own motion.

7. Exhibit 1 hereto is a schedule of all amounts paid by Giant Eagle and due from Debtor for the post-petition/pre-rejection record. The total amount is \$25,277.10. (Due to a successful real estate tax appeal, the real estate taxes on Circuit City's parcel is less than the amount estimated when the original claim was filed.) These amounts are the liability of Debtor

for breach of the Ground Lease and Assumption Agreement, and pursuant to their terms and under common law.

8. Giant Eagle has paid these amounts to the Landlord. Debtor has indemnified Giant Eagle for all such payments under paragraph 2 of the Assumption Agreement.

9. Attached hereto is the Declaration of Nicholas Burkett¹ affirming that the above amounts are accurate pro-rata assessments from Giant Eagle's books and records kept in the ordinary course of business and are amounts actually paid.

10. Included in Exhibit 1 is the amount of \$1,344.09 for an unearned rent subsidy. Pursuant to the Assumption Agreement, as additional consideration for inducing Debtor to assume the obligations of a tenant under the Ground Lease, Giant Eagle agreed to pay Debtor a rent subsidy every month to defray the rent Debtor was paying to Sierra North. In March 2009, this amount was \$2,083.34.

11. Giant Eagle paid the full \$2,083.34 to Debtor on March 1, 2009 for March 2009. Debtor paid only 11/31 of the monthly rent to Sierra North for March, however, causing Giant Eagle to have to pay Sierra North the other \$20,161.29 or 20/31 of \$31,250.00. Therefore, Giant Eagle ended up paying 20/31 (or 64.52%) of the \$2,083.34, or \$1,344.09, twice. Put another way, Debtor was overpaid \$1,344.09 in March 2009 in that this was the pro-rata portion of the subsidy attributable to the last 20 days of March, but Debtor did not pay that rent and so did not give consideration for this portion of the subsidy.

12. Address for notices: all communications involving this claim or the objection should be directed to counsel below.

¹ Nicholas Burkett, Supervisor, Lease Administration, Giant Eagle, Inc., 101 Kappa Drive, Pittsburgh, PA 15238, (412) 963-6200.

WHEREFORE, Giant Eagle respectfully requests that the Fourth Omnibus objection concerning Claim No. 14019 be dismissed and that its administrative claim be allowed in the amended amount of \$25,277.10.

Dated: April 6, 2011

CHRISTIAN & BARTON, LLP

/s/ Michael D. Mueller

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Counsel for Giant Eagle, Inc.

CERTIFICATE OF SERVICE

I, Michael D. Mueller, hereby certify that on the 6th day of April 2011, a true and correct copy of the foregoing Response has been served electronically using the ECF system on all registered users of the CM/ECF system who have filed notices of appearance in this matter.

/s/ Michael D. Mueller

Michael D Mueller

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DECLARATION OF NICHOLAS BURKETT
UNDER 28 U.S.C. § 1746

I, Nicholas Burkett, pursuant to 28 U.S.C. § 1746, state as follows:

1. I am an adult individual over 18 years of age with personal knowledge of the information set out herein.
2. I am an employee of Giant Eagle, Inc. My position is Supervisor, Lease Administration.
3. Due to Circuit City's failure to pay any rent to Sierra North Associates, the landlord of the Altoona Circuit City store, Giant Eagle had to pay Sierra North the sum of \$31,250.00 for November 2008.
4. Under the Assumption Agreement, Giant Eagle paid Circuit City a monthly rent subsidy of \$2,083.34 to defray the rent of \$31,250.00 Circuit City was required to pay Sierra North every month.
5. Giant Eagle timely paid Circuit City the \$2,083.34 rent subsidy for November 2008 but Circuit City did not pay the rent for that month.

6. Giant Eagle timely paid Circuit City the \$2,083.34 rent subsidy for the full month of March 2009, but Circuit City only paid Sierra North the sum of \$11,088.71 or 11/31 of the March 2009 rent.

7. Giant Eagle paid Sierra North the remaining March 2009 rent of \$20,161.29.

8. The total real estate taxes paid by Giant Eagle for calendar year 2009 for the Circuit City premises in Altoona was \$15,935.00. The portion of this attributable to January 1, 2009 to March 12, 2009 is $71/365 \times \$15,935.00$ or \$3,099.68.

9. The above information comes from my personal knowledge and from a review of the books and records of Giant Eagle, Inc. that are kept in the ordinary course of business. This information was recorded in the ordinary course of Giant Eagle's business at or near the time that the amounts were paid or obligations were incurred. It is a part of my business duties to review these records for accuracy and completeness and I confirm to the best of my knowledge after review that the amounts are accurate and were paid as described.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2011.



Nicholas Burkett